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Movies, Censorship, and the Law by Ira H. Carmen

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Book Reviews

MOVIES, CENSORSHIP, AND THE LAW. By Ira H. Carmen. Ann Arbor: University of Michigan Press, 1966. Pp. x, 339. $7.95.

Movies, Censorship, and the Law is an extensive, thorough treatment of regulatory policies of state and local government agencies dealing with films in which the author[1] has emphasized the impact of court decisions on censors. The first half of the volume is a basic constitutional law analysis of cases through 1965 relating not only to movies but to larger freedom of speech questions. Carmen shows how free speech law developed and then later became applicable to movies. The emphasis on analysis rather than description is welcome; the reader will find himself recalling cases he has read before but remembers only in terms of a general holding. In the second half of the book, Carmen discusses state and local censorship systems, with particular attention given to those operating when he wrote. When we realize that less than one-fifth of the states have had a censorship system (as compared with almost universal enactment of subsequent-punishment obscenity statutes), the constitutional problem is placed in some perspective.

Approximately fifty localities appear to have some censorship mechanism, most of them haphazard; only Chicago, Atlanta, Memphis, and Detroit, all discussed at length, have systematic action. Carmen's format for dealing with state and local systems is uniform: first, a statutory exposition, in which provisions of the relevant act(s) are compared with court opinions; second, changes or revisions in the law; third, state court cases, particularly those dealing with individual movies; and fourth, a discussion of interviews conducted with censorship officials. After examining the disposition of state decisions by the United States Supreme Court, the author focuses on the state court cases, showing how the Court's rulings were received.

Carmen makes several important points in his analysis of the significant cases. Courts have not treated the movies on the same basis as other modes of expression, following the ruling in *Mutual Film Corporation v. Industrial Commission of Ohio*,[2] in which movies were held to be only entertainment and business. The author also

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[2] 236 U.S. 230 (1915).

points out that *Mutual Film* was decided before *Gitlow v. New York*,[3] in which the first amendment was applied to the states. Thus the line of cases evolving from that application developed *after* an initial determination that movies did not come within the scope of free speech. Even if the temporal sequence had been the reverse, it might have made no difference. Despite the "incorporation" of the first amendment in *Gitlow*, the Justices' view of movies might have been the same post-*Gitlow* as before it.

In addition to considering cases obviously having to do with censorship and movies, Carmen also discusses cases dealing with parade permits and retail licenses which, at first blush, may not seem directly relevant, but have much to say concerning the discretion of government officials and the use of prior restraint. The different types of "prior restraint" are well selected by the author to give a clear distinction between licensing, injunction procedures of the type used in *Kingsley Books v. Brown*,[4] and morality commissions.

An interesting sidelight is given to *Near v. Minnesota*,[5] regarded by many as standing against prior restraint. Justice Hughes remarked that states could prevent obscenity and Carmen demonstrates the definite implications of this remark for the subsequent history of censorship. *Burstyn v. Wilson*[6] is often quoted in support of the proposition that "sacrilegious" is too vague to be permissible. Carmen shows there was another major point to the case: that movies have the same status as other forms of expression. However, both the second *Times Film Corporation v. Chicago*[7] and *Freedman v. Maryland*[8] make it clear that the Justices still do not think of movies as being of the same "rank" as other forms of expression. While *Freedman* improved the due process standards in movie censorship, both cases made it evident that a decision giving movies the same status as other means of expression did not mean that movies had to be *treated* the same.

Important state supreme court cases, particularly those in which the United States Supreme Court denied certiorari or issued per curiam rulings, are analyzed. The seeming simplicity of the per curiam decisions is shown to be illusory, particularly when the Supreme Court's *result* is read in connection with the lower court's

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[3] 268 U.S. 652 (1925).
[4] 354 U.S. 436 (1957).
[5] 230 U.S. 697 (1931).
[6] 343 U.S. 495 (1952).
[7] 365 U.S. 43 (1961). The first, less well-known, was a per curiam reversal of Chicago's refusal to license a movie. 139 F. Supp. 837 (N.D. Ill. 1956), *aff'd*, 244 F.2d 432 (7th Cir. 1957), *rev'd*, 355 U.S. 35 (1957).
[8] 380 U.S. 51 (1965).

opinion. An interesting sidelight is cast on the later decision in *Roth v. United States*[9] by an earlier Supreme Court per curiam opinion overturning a Kansas ruling which had upheld a refusal to issue a permit on the grounds "The Moon Is Blue" was "obscene."[10] At least one implication might have been that the Court was restricting the use of obscenity as a grounds for limiting modes of expression.

The confusion created by *Burstyn,* with additional cases coming to the Court as a result, is an example of the Court making work for itself. The per curiam responses to those post-*Burstyn* appeals compounded an already unclear situation. This is similar to the post-*Roth* process, when the Court used the per curiam device to dispose of *One, Incorporated v. Olesen*[11] and *Sunshine Book Company v. Summerfield,*[12] leaving the implication that homosexuality and nudity (even in unretouched photographs) were not within the ambit of the "obscene." Both sequences are illustrations of the proposition that "Courts are more likely to become arenas for further development of policy when court opinions are ambiguous than when the opinions are precise."[13]

Carmen makes clear that the Supreme Court, which had deferred defining obscenity for many years, could have deferred the problem still longer. *Roth* did not require a definition, because no issue of the material's obscenity was raised. The author notes the whole raft of questions which can be asked about the lack of precision in Justice Brennan's definition and concludes that the issue is not simply the definition itself but the "constitutionally permissible scope of any measure designed to discourage . . . dissemination"[14] of obscenity, because of lack of consensus on the word's meaning. The author and this reviewer agree about the clarity of Justice Harlan's argument in *Alberts v. California*[15] concerning the relative role of federal courts and state governments (Carmen calls it "a study in the lucid and the logical"[16]), but differ on Harlan's federalism argument as applied in *Roth.* Carmen feels the latter is based on value judgments about where obscenity could best be handled and thinks Harlan hangs the distinction between

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[9] 354 U.S. 476 (1957).

[10] Holmby Productions v. Vaughn, 177 Kan. 728, 282 P.2d 412 (1953), *rev'd,* 350 U.S. 870 (1955).

[11] 355 U.S. 371 (1958).

[12] 355 U.S. 372 (1958).

[13] S. Wasby, The Pure and the Prurient: The Politics of Obscene Literature in Oregon, 1962 (unpublished Ph.D. dissertation, University of Oregon); S. Wasby, The Supreme Court, Obscenity, and Oregon Policy, 1964 (paper presented to American Political Science Association).

[14] I. CARMEN, MOVIES, CENSORSHIP, AND THE LAW 81 (1966).

[15] 354 U.S. 476 (1957).

[16] I. CARMEN, *supra* note 14, at 76.

state and federal treatment on hard-core pornography; this reviewer believes the Justice based the difference in the roles he prescribed for the two levels of government on a "clear and present danger" requirement, not an unreasonable distinction in terms of the historical argument which Harlan in part utilizes.

Carmen's picture of state and local censorship is most thorough in terms of the variety of existing conditions, different support, variable entanglement with the courts, and organizational hodge-podge. Informal practices, *e.g.*, restricting a film to the "art house circuit," show the censors' discretion; in addition, cuts made to transform a film into the "suitable for Sunday viewing" category are retained during the week. The broad impact of the work of the censors also becomes imminently clear in light of the fact that cuts ordered by one state are felt elsewhere because central distributors do not prepare more than one version of a film. Also, one state statute incorporated by reference the standards of a private reviewing organization and the New York censors.

The presentation of the interview material provides some difficulties. The interview form and interview protocols are reproduced in the Appendix. Comments on the interview form, which should have been relegated to a Methodological Note in the Appendix, are first presented. Then, in summarizing interviews with particular officials, Carmen, presuming the reader has read the interviews first, refers to specific questions by number, requiring frequent reference to the end of the volume. A narrative discussion of the interview results would have been preferable to the present awkward arrangement. Fascinating as the protocols are, they should be read separately. Carmen seems somewhat surprised by the frankness of many individuals connected with censorship systems. While this reaction is perhaps justified because of the refusal of Kansas officials to be interviewed and of Detroit personnel to allow publication of their interviews, it must be remembered both that public officials are accustomed to being interviewed and that they probably do not have the suspicion of outsiders from the academic community Carmen may have presumed them to have. Carmen's personal impressions of the people he interviewed, however important for "local color," do not add to the book (the same can be said for his personal footnote opinions on some movies he has seen). The author's surprise at the large role the Executive Assistant plays in the Maryland arrangement suggests some naivete about the amount of power full-time officials (albeit "staff assistants") have over part-time officials who are formally their superiors.

The interviews are presented to illuminate local practices, not to

provide the basis for a statistical study. The principal purpose in their use seems to have been to allow us to compare the censors' responses with court standards, in line with the author's "basic supposition . . . that Supreme Court decisions are of minimal value unless they are given support at the communal level."[17] Certainly, along with statutory analysis, they provide substantial evidence for the author's conclusion that "Each city and each state using a systematic program of movie censorship here surveyed operates under a legal framework that is in some measure at the least, violative of due process and at the most, in conflict with *Burstyn v. Wilson* and its *free speech corollaries*."[18]

Not content with summarizing, the author discusses possible changes in the system. Carmen seems to prefer a *Kingsley Books* type of in rem injunctive procedure applied to movies allowing classification to protect children. He does look at existing practices in this area of the law, and suggests that use of a *Roth-Alberts* "average person" standard would solve most vagueness problems. However, Carmen fails to remember his own observation about classifications: that they strike at the major markets of some distributors and thus restrict the number and type of films made available. Moreover, if one believes critics of our society's sexual morality, many of our adults are clearly not mature, and a child/adult distinction as the basis for film classification would not be satisfactory. This last section shows the difficulty of jumping from description and analysis to prescription. Little foundation is laid for Carmen's jump. While his opinions are certainly shared by many, his study does not equip him to make such preferential statements on any better basis than the rest of us. Carmen knows the law, its impact, and can perhaps say what would at present pass the Court's scrutiny, but this is not the same as saying which procedures *should* be enacted into law. As the Justices themselves would agree, that a law will survive their scrutiny is no final test of its wisdom. This difficulty in the author's argument is made most clear when he says that society has a *right* "to be protected from the revulsions of obscenity,"[19] and then, in what is clearly a non-sequitur. asserts that "adults may be kept from seeing films whose dominant appeal relates to the prurient instincts of the average person."[20] Adults could as easily decide for themselves and voluntarily turn away, particularly if they are the "enlightened, mature" people Carmen says the first amendment presumes.

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[17] *Id.* at 225.
[18] *Id.* at 241.
[19] *Id.* at 259.
[20] *Id.*

This criticism applies only to a minor portion of the book. Even the above mentioned problems of interview presentation do not interfere with the author's providing a vast amount of well-organized, valuable material. Carmen has rendered scholars in the civil liberties area, and in the field of obscenity and censorship law in particular, a tremendous service in writing this definitive volume. *Movies, Censorship, and the Law* deserves to be widely read, inside the legal profession and out; it will be easily understood by both groups.

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